Supreme Court, U.S.
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No. 15-7250

In The Supreme Court of the United States

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a notice of appeal filed after a district court announces its sentence, but before it amends this sentence to specify a restitution amount, automatically matures to perfect an appeal of the amended judgment.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Marcelo Manrique*, No. 14-13029, is not published in the Federal Reporter but is available at 618 F. App'x 579 (11th Cir. 2015), *reh'g en banc denied* (Sept. 11, 2015), and is set forth in the Joint Appendix at JA 78, 86. The district court's judgment imposing sentence, entered June 24, 2014, is set forth at JA 31, and its amended

judgment imposing sentence, entered September 18, 2014, is set forth at JA 66.

STATEMENT OF JURISDICTION

The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have appellate jurisdiction of all final decisions of United States district courts. The judgment of the Court of Appeals was entered on July 15, 2015. A timely petition for rehearing and rehearing *en banc* was denied on September 11, 2015. The petition for writ of certiorari was timely filed on December 2, 2015, invoking this Court's jurisdiction under 28 U.S.C. § 1254(1). The petition was granted on April 25, 2016.

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 4, Federal Rules of Appellate Procedure Appeal as of Right – When Taken

* * *

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

* * *

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

Rule 52, Federal Rules of Criminal Procedure Harmless and Plain Error

(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Title 18 U.S.C. § 2252(a)(4)(B)

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

* * *

(4) . . . (B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of

interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

* * *

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years. .

CHAPTER 227 – SENTENCES
Title 18 U.S.C. § 3556
Order of Restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.

CHAPTER 232 – MISCELLANEOUS SENTENCING PROVISIONS
Title 18 U.S.C. § 3663A
§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

* * *

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

* * *

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Title 18 U.S.C. § 3664
§ 3664. Procedure for issuance and enforcement of order of restitution

* * *

(d)(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final

determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

* * *

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that –

(1) such a sentence can subsequently be –

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under section (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

STATEMENT OF THE CASE

A. District Court Proceedings.

Marcelo Manrique pleaded guilty to violation of 18 U.S.C. § 2252(a)(4)(B), possession of material involving sexual exploitation of minors. On June 23, 2014, the district court sentenced Mr. Manrique to 72 months imprisonment, lifetime supervised release, and announced that "restitution is mandatory." JA 26-28.

A Judgment in a Criminal Case was filed the next day, June 24, 2014. It recites the terms of imprisonment and supervised release, and states that, "The determination of restitution is deferred until 8/22/2014. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination." JA 31, 39. Mr. Manrique filed a timely notice of appeal on July 8, 2014, directed to the final judgment and sentence. JA 42. The appeal was docketed by the Court of Appeals for the Eleventh Circuit under Case No. 14-13029. JA 8.

The district court held a restitution hearing on September 17, 2014, following a postponement of the original date. The government relied on a letter and affidavit prepared by an attorney for "Angela," a person portrayed in photographs, which sought restitution of $11,980 to $16,400. JA 45, 46, 48-49. Defense counsel objected, contending that the affidavit was boilerplate, inaccurate, erroneous and excessive, and that the government had not met its burden of proof to establish any victim loss under this Court's decision in *Paroline v. United States*, 572 U.S. ___, 134 S. Ct. 1710

(2014). JA 51-57, 61-62. In light of the objections, the government offered to settle the matter with agreed restitution of $1,000 to $1,500, JA 48, but defense counsel argued that the government failed to meet its burden to prove any amount of restitution. JA 51-57, 59, 61-62. The government then offered an alternative: There were 45 images at issue and the court should award $100 per image, $4,500. JA 60-61. The district court awarded $4,500 restitution with this explanation:

> THE COURT: * * * I don't know the answer to this. I hope the Eleventh [C]ircuit will give me some guidance if they feel that I am wrong on this, but you just have to take a position on it and as far as I'm concerned, I believe this young woman is entitled to some restitution from this defendant and I don't know any other way of determining it other than to come up with a per-image charge. And I think the $100 is a fair amount.

JA 61-62.

The district court entered a second Judgment in a Criminal Case, dated September 18, 2014. The caption of the second judgment specifically referenced the original judgment of "6/23/2014" and explained the reason for the "amendment" as "Modification of Restitution Order (18 U.S.C. § 3664)." The amended judgment is the same as the first in all respects except it specifies the dollar amount of restitution – $4,500 – and the manner in which it should be paid. JA 66, 74-75. Five

days later, on September 23, 2014, the district court clerk transmitted the amended judgment to the Court of Appeals, which filed it on the docket of the appeal already pending in that court. JA 10.

B. Court of Appeals Proceedings.

Mr. Manrique initiated an appeal of the judgment and sentence by filing a notice of appeal on July 8, 2014, following entry of the initial judgment. JA 42. The amended judgment including restitution was filed on the docket of the pending appeal on September 23, 2014. *See* COA Docket Sheet, Case No. 14-13029 (Sept. 23, 2014) ("USDC Restitution Order as to Appellant Marcelo Manrique was filed on 9/18/2014. Docket Entry 67"). JA 10. All transcripts of proceedings, including the restitution proceeding, were prepared and filed in the Court of Appeals before the Court of Appeals' Clerk issued a first briefing notice. JA 10.

The parties thereafter briefed the issues on appeal, including a challenge to the restitution portion of the judgment, between December 2014 – February 2015, months after both judgments had been entered and filed in the Court of Appeals under the single case number. The government did not challenge the Court of Appeals' jurisdiction over the restitution portion of the sentence, nor did the government allege it suffered any prejudice from a single notice of appeal. Instead, the government argued that Mr. Manrique's failure to file a second notice of appeal "operated as a waiver of

his right to appeal the district court's order of restitution." Br. Appellee 25.

The Court of Appeals addressed and rejected appellate challenges to the sentence of imprisonment and lifetime term of supervised release, but determined – *sua sponte* – that it lacked jurisdiction to decide the restitution issue because the appellant did not file a second notice of appeal once the second judgment was entered. JA 78, 85.

Mr. Manrique filed a petition for rehearing and rehearing *en banc*, which challenged the Court of Appeals' *sua sponte* decision that it lacked jurisdiction over the restitution question. The Court of Appeals denied rehearing and rehearing *en banc* on September 11, 2015. JA 86.

Mr. Manrique filed a timely petition for writ of certiorari, which the Court granted on April 25, 2016.

SUMMARY OF ARGUMENT

The Court's decision in *Dolan v. United States*, 560 U.S. 605 (2010), allows a district court to sentence a criminal defendant, including restitution generally, and later determine the precise amount of restitution to award under the Mandatory Victim Restitution Act. A judgment amending the sentence to detail restitution is then entered, which the Court has described as "essentially fill[ing] in an amount-related blank in a

judgment that made clear that restitution was 'applicable.'" 560 U.S. at 620. The *Dolan* decision acknowledged that "the interaction of [deferred] restitution orders with appellate time limits could have consequences," but left those matters undecided. One question left open is how many notices of appeal are required to perfect a single appeal of a judgment imposing sentence (including restitution, generally), and an amended judgment specifying the details of restitution.

Federal Rule of Appellate Procedure 4(b)(1)&(2) answers the question presented: A single notice of appeal perfects the appeal of a criminal judgment and sentence imposing restitution under the Mandatory Victim Restitution Act, as well as a later-entered amended judgment specifying the precise details of restitution. All but one circuit to have addressed the question have held that a single notice of appeal suffices. The Eleventh Circuit takes a contrary view, holding that it lacks jurisdiction to entertain an appeal of an amended judgment specifying the amount of restitution unless a second notice of appeal was filed.

The Eleventh Circuit's holding is incorrect for two reasons. First, the rules of practice and procedure governing criminal appeals allow a single notice to perfect an appeal of a judgment and sentence, as well as an amended judgment that essentially fills in the amount-related blank in a judgment that made clear that restitution was applicable. Second, the Eleventh Circuit's decision misapplied jurisdictional principles to alleged noncompliance with court rules, in place of

the applicable substantial-prejudice test of Fed. R. Crim. P. 52(a).

A. The Eleventh Circuit's conclusion that a second notice of appeal was due to be filed to perfect an appeal of the restitution issue is incorrect and fails to acknowledge the impact of Fed. R. App. P. 4(b)(2). Rule 4(b)(2) allows that "[a] notice of appeal filed after the court announces a decision, sentence or order – but before entry of the judgment or order – is treated as filed on the date of and after entry." The rule provides that a notice of appeal filed after a decision is announced, but before judgment is entered on the decision, matures or springs forward to embrace a later-filed judgment. It applies, as well, when the district court enters an intervening judgment that does not fully detail the court's full decision. When the amended judgment is entered that completes the initial judgment, it merges into the original incomplete judgment, so that the two judgments together become the final judgment. The earlier-filed notice of appeal then matures to embrace it. This interpretation is consistent with the *Restatement (Second) of Judgments*, as well as the decisions of the circuits holding that a single notice of appeal perfects appeal of both judgments, even if it is filed before entry of the amended judgment.

B. Applying Rule 4(b)(2) to appeals of an initial judgment imposing sentence, and an amended judgment filling in the blanks of restitution already awarded, generally, is consistent with the Federal Rules of Appellate Procedure, as well as the real-world practice of federal appeals in criminal cases.

As a threshold matter, the rules provide that a criminal appeal is perfected by the filing of a notice of appeal. The antiquated practice for delineating issues at the outset of a case by an assignment of errors was abolished as obsolete by the middle of the last century. Under the modern rules, a simple notice of appeal perfects the appeal. The issues to be addressed on appeal, and the portions of the judgment that are challenged, are first revealed during briefing by the parties. Permitting an earlier-filed notice of appeal to perfect an appeal of a later-filed judgment – especially one that simply fills in the blanks of restitution in an earlier judgment that made clear that restitution was applicable – is entirely consistent with the approach taken in the rules of appellate procedure.

Notably, rules of appellate procedure relevant to criminal cases do not specifically address the deferred amended judgment procedure contained in the Mandatory Victim Restitution Act, or as it is implemented by the Court's decision in *Dolan*. This is in contrast to other provisions of the rules, specific only to civil appeals, which are explicit about the need for amended notices of appeal when a judgment under appeal is thereafter altered. Recognizing that amendments are required in civil cases, there is also a specific exemption from the need to pay additional filing fees for amended notices of appeal. In contrast, there are no parallel rules addressing criminal appeals. The absence of such rules in the criminal subsections of Rule 4 has led courts and legal scholars to infer that there

is no requirement for an additional notice of appeal following an amended judgment specifying restitution, which is entered during an appeal of the initial judgment.

This interpretation of Rule 4(b)(2) is also consistent with modern appellate practice, in which electronic filing and dockets are the universal norm in the federal courts. Ensuring that an appeal includes the amended judgment and relevant transcripts is accomplished by an electronic filing. Mr. Manrique's case proves this: The amended judgment was filed on the docket of the Court of Appeals only five days after it was entered in the district court, and all relevant transcripts were filed months before briefing commenced. The docket sheet itself notes that the entire record on appeal is available electronically.

Interpreting Rule 4(b)(2) as being inapplicable to amended judgments in restitution appeals creates a trap for the unknowing litigant, the type of trap that the Court effectively abolished by the 1993 amendments to Rule 4. Such an interpretation would be inconsistent with the rules established by the 1993 amendments, which now specifically detail when amended notices of appeal are required for civil litigants. In a very real sense, it would open a trap for those litigating criminal appeals that the drafters of the rules closed as unfair in civil cases.

C. Appeals in criminal cases are governed by the Federal Rules of Appellate Procedure. The process for initiating an appeal and the time limit for doing so are

established by court rule only, not by statute. Although time limits set by statute are jurisdictional, time limits set by rule are not. For this reason, the Court's precedents hold that the time limit for initiating a criminal appeal is not jurisdictional. This Court held over six decades ago that alleged irregularities in filing a notice of appeal are to be evaluated under the substantial-prejudice test of Fed. R. Crim. P. 52(a).

Instead, the Eleventh Circuit categorically refused to entertain Mr. Manrique's appeal of the amount of restitution awarded based on a perceived failure to comply with the appellate rules for criminal appeals. The Court of Appeals held, *sua sponte*, that it lacked jurisdiction to entertain Mr. Manrique's appeal of the amount of restitution awarded as part of his sentence because a second notice of appeal was not filed after entry of the deferred amended judgment specifying the restitution award. Assuming, *arguendo*, that this irregularity occurred, it did not raise a jurisdictional bar to entertaining the appeal. Any such irregularity was due to be evaluated under Rule 52(a)'s substantial-prejudice test. Yet, the government did not allege, nor did the Court of Appeals find, any prejudice resulted from the absence of a second notice of appeal.

This case mirrors a typical deferred restitution appeal. At Mr. Manrique's sentencing hearing, the district judge pronounced terms of imprisonment and supervised release, and announced that restitution is mandatory. The final judgment imposing sentence deferred entry of the precise restitution amount, stating it would be contained in an amended judgment. Mr.

Manrique filed a notice of appeal. While the appeal of his sentence was pending, but before any briefing took place, a second judgment imposing sentence was entered, identical in all respects to the first, except it detailed the specifics of restitution. Both parties thereafter briefed the appeal, including a challenge to the restitution award.

Although the government never contended it was prejudiced by the absence of a second notice of appeal, the Court of Appeals independently perceived that the failure to file a second appeal was an irregularity. This perceived irregularity was due to be evaluated under Rule 52(a)'s substantial-prejudice test, under which it would have to be disregarded because no prejudice was alleged by the government nor found by the Court of Appeals. The Court of Appeals' mistaken jurisdictional analysis caused it to erroneously refuse to entertain the restitution issue, which was properly raised and fully briefed by both parties in the appeal.

It is difficult to imagine circumstances in which the government might be substantially prejudiced by the absence of a second notice of appeal. But should one occur, it is readily accommodated and ameliorated by existing rules of appellate procedure and practice.

ARGUMENT

A notice of appeal filed after a district court announces its sentence, but before it amends this sentence to specify a restitution amount, automatically matures to perfect an appeal of the amended judgment.

The Court's decision in *Dolan v. United States*, 560 U.S. 605, 608 (2010), held that the 90-day limit for ordering restitution under the Mandatory Victim Restitution Act, 18 U.S.C. §§ 3663A & 3664(d)(5), is not ironclad or jurisdictional. The decision permits a district judge to sentence a criminal defendant and later determine the precise amount of restitution. As a result, a district court may enter an initial judgment imposing sentence, including a nonspecific award of restitution, and later amend the sentence to specify the details of the restitution award,[1] even if the original judgment and sentence is already on appeal. The Court characterized the amendment as "essentially fill[ing] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" 560 U.S. at 620. The Court recognized its decision might affect appellate review of the judgments, but "le[ft] all such matters for another day." 560 U.S. at 618. One open question about appellate review is whether a single notice of appeal perfects an appeal of both the original judgment, as well as the amended judgment specifying the amount of restitution, if the amendment is entered

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[1] Restitution is imposed by the sentence. *See* 18 U.S.C. §§ 3556 and 3664(o).

during the ongoing direct appeal of the initial judgment.

Three of four circuits answer the question in the affirmative, holding that a single notice of appeal perfects appeal of both the initial judgment and later-filed amended judgment, absent prejudice to the government. *See United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004) (holding premature notice of appeal filed after sentencing, but before restitution was ordered, was sufficient, where both parties fully briefed the restitution issue and there was no question of government surprise or prejudice); *United States v. Ryan*, 806 F.3d 691, 692 (2d Cir. 2015) (holding single notice of appeal filed as to judgment including sentencing covers later-filed amended judgment including restitution "because amended judgment supersedes the original judgment"); *United States v. Hyde*, 556 F. App'x 62, 63 n.1 (2d Cir. 2014) (holding that original notice of appeal of criminal judgment " 'ripened into an effective notice' of appeal from the amended judgment" designating restitution); *United States v. Stoian*, 2015 WL 5036366 (6th Cir. Aug. 12, 2015) (holding notice of appeal timely filed as to final judgment "spring[s] forward" to confer jurisdiction on deferred judgment regarding restitution) (relying on *United States v. Malcolm*, 114 F.3d 1190 (6th Cir. 1997) (table), 1997 WL 311416 *6 (holding premature notice of appeal in criminal case is valid and matures to cover later-filed judgment, absent prejudice to the government)).

Contrary to the decisions of those three circuits, the Eleventh Circuit has answered the question in the negative:

> We do not have jurisdiction to entertain Manrique's challenge to his restitution amount because he did not file a notice of appeal designating the amended judgment setting forth the restitution amount.

JA 85, 618 F. App'x at 583. This categorical jurisdictional holding is wrong. It incorrectly applies a jurisdictional bar based upon an alleged irregularity in complying with the Federal Rules of Appellate Procedure. And, it overlooks the proper operation of Fed. R. App. P. 4(b)(2), which allows a single notice of appeal to perfect an appeal of a deferred amended judgment that modifies the original sentence by "essentially fill[ing] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" *See* 560 U.S. at 620.

A. A single notice of appeal in a criminal case perfects the appeal of both the initial judgment and amended judgment specifying the amount of restitution.

A criminal appeal is perfected by the filing of a notice of appeal that is timely under Fed. R. App. P. 4. *See* Fed. R. App. P. 3(a)(1). Rule 4(b)(1)(A)(i) requires the notice to be filed "within 14 days after the later of

the entry of either the judgment or order being appealed. . . ." Rule 4(b)(2) activates a premature notice of appeal. Rule 4(b)(2) states:

> **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

The operative point of time referenced in both subsections of Rule 4(b) is entry of "the judgment." Under the deferred restitution process set forth in 18 U.S.C. §§ 3663A and 3664(d)(5), "the judgment" is a combination of the initial judgment and sentence (which includes a non-specific award of restitution), and the later-filed amended judgment specifying the details of restitution. This is due to the language of the statute's subsections and the interpretation this Court set forth in *Dolan*.

In a deferred restitution case under the Mandatory Victim Restitution Act, the district judge is required to order restitution at sentencing, *see* 18 U.S.C. §§ 3556 & 3663A(a)(1)&(c), but is permitted to defer entry of judgment on the specifics of restitution. *See* 18 U.S.C. § 3664(d)(5). To accomplish this, the district court announces at the sentencing hearing that restitution is mandatory (or words to that effect) and that the specifics of restitution will be entered in an amended judgment. *See, e.g., United States v. Cheal*, 389 F.3d 35, 46-47 (1st Cir. 2004) (announcing that defendant will pay restitution, reciting that fact in final judgment, but deferring restitution hearing, then

entering deferred amended judgment including restitution amount). A judgment is then entered reciting that announcement. An amended judgment is later entered, "essentially fill[ing] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" *Dolan*, 560 U.S. at 620.[2]

In a case of deferred restitution, "the judgment" referenced in Rule 4(b)(1)&(2) is a combination of both the initial judgment and the amended judgment, because they merge together into one. *See United States v. Ryan*, 806 F.3d at 692. In a very real sense, the first judgment is only a partial final judgment in that it acknowledges the announced restitution, but it leaves blank the specifics of restitution. The amended judgment fills in the blanks of restitution that the original judgment declared as applicable. Together, they are "the judgment" being appealed under Rule 4(b)(1)&(2). This may seem an unusual procedure for the entry of a final judgment, because, as a general rule a district court loses jurisdiction to alter the final judgment

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[2] Mr. Manrique's case followed this common path. The district judge pronounced sentence, including terms of imprisonment and lifetime supervised release, and also announced that "restitution is mandatory." A judgment was entered the next day, reciting the terms of imprisonment and supervised release, but deferring entry of the restitution portion of the sentence. He filed a timely notice of appeal of the judgment and sentence. After the dollar amount of restitution was determined, the district court entered a second judgment specifying that it amended the original judgment with a "Modification of Restitution Order." It was the same as the first judgment in all respects except it filled in the blanks left open in the restitution section of the judgment and sentence.

while the case is on appeal. But the two-step process of entering "the judgment" is a necessary consequence of the deferred restitution procedure set forth in § 3664(d)(5), as interpreted and applied in *Dolan*. Thus, a notice of appeal filed after sentencing (or even after the initial judgment) is filed "after the court announces a decision, sentence or order – but before the entry of the judgment" specified in Rule 4(b)(2). As a result, the notice of appeal matures and springs forward to perfect appeal of "the judgment," which by then includes the later-filed amended judgment specifying the amount of restitution.

Such a multi-step process for arriving at "the judgment" is recognized by the *Restatement (Second) of Judgments*, which addresses the finality of judgments as it relates to *res judicata* and appeal. Ordinarily, "[f]inality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other relief, remains to be determined." *Restatement (Second) of Judgments*, § 13, Requirement of Finality, comment *b* (1982) (June 2016 update). However, as the *Restatement* recognizes, finality can take on different meanings because "considerable liberties are being taken with finality in the context of appeal in order to take care of various exigent situations in which prompt review by the higher courts is thought necessary." *Id.*

The restitution procedure authorized by § 3664(d)(5) and the Court's decision in *Dolan* illustrate the *Restatement*'s comment about the impact of permitting appeals before the judgment reaches full finality. As part of his argument before the Court, Dolan contended that a sentencing judgment is not final until it contains a definitive determination of restitution. 560 U.S. at 616, 617. Rather than decide the finality question directly, the Court noted that the initial judgment could be final enough for purposes of appeal because "strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount." *Id.* The Court's decision permits an initial judgment to be appealed immediately to avoid the exigency of "forc[ing defendants] to wait three months before seeking review of their conviction when they ordinarily could do so within 14 days." 560 U.S. at 618. The first judgment – announcing restitution, but not specifying it – would be deemed final for appeal even though the *Restatement* would contend that it is not because it leaves blank the specifics of restitution.

Without holding that the initial judgment is "the" final judgment, *see* 560 U.S. at 617, the Court noted that the entry of this initial judgment can suffice to start the appeal process. This does not discount that the judgment is not final in the ordinary sense of finality of the case. Later, when the amended judgment fills in the blanks of restitution that the original judgment announced, the amended judgment merges into the

original judgment, and together, they form "the judgment" referred to in Rule 4(b)(1)&(2). Following entry of the amended judgment, the earlier-filed notice of appeal matures to embrace it.

As noted above, decisions in three of four circuits have expressly recognized court of appeals' jurisdiction over an amended judgment imposing restitution based on a premature notice of appeal. *See United States v. Cheal* (1st Cir.); *United States v. Ryan* (2d Cir.); *United States v. Hyde* (2d Cir.); *United States v. Stoian* (6th Cir.); *United States v. Malcolm* (6th Cir.). These circuit decisions are in accord with those of six other circuits, recognizing jurisdiction over criminal appeals, generally, even though perfected only by a premature notice that matured under Rule 4(b)(2).[3]

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[3] *See, e.g.*, *United States v. Andrews*, 681 F.3d 509, 516 n.2 (3rd Cir. 2012) (holding premature notice of appeal deemed filed as of date final judgment was later entered); *United States v. Thornton*, 1 F.3d 149, 157-58 (3rd Cir. 1991) (holding Court of Appeals had jurisdiction over appeals of post-trial motions, despite premature notice of appeal, because parties had fully briefed the issues without any claim of prejudice); *United States v. Bly*, 510 F.3d 453, 457 n.6 (4th Cir. 2007) (holding Court of Appeals had jurisdiction, despite premature notice of appeal, based on Rule 4(b)(2) because it "is deemed to be 'filed on the date of and after entry' "); *United States v. Winn*, 948 F.2d 145, 155 (5th Cir. 1991) (holding that, absent prejudice, Court of Appeals would hear challenges to both judgment and sentence despite premature notice of appeal); *United States v. Baker*, 559 F.3d 443, 447 n.2 (6th Cir. 2009) (holding Court of Appeals had jurisdiction over premature notice of appeal filed after sentencing, but before judgment entered); *United States v. Cantero*, 995 F.2d 1407, 1408 n.1 (7th Cir. 1993) (holding that Rule 4(b)(2) permits notice of appeal to be filed after sentencing, but before entry of final judgment); *United*

In the context of amended judgments imposing restitution, only the Eleventh Circuit in *Manrique* holds that it lacks jurisdiction in the case of a premature notice of appeal. Of note, in reaching its decision below the Eleventh Circuit expressly overruled its own prior precedent, which had also recognized jurisdiction in these circumstances. *See United States v. Kapelushnik*, 306 F.3d 1090 (11th Cir. 2002), abrogated by *Manrique*; *United States v. Quincoces*, 503 F. App'x 800, 802 (11th Cir. 2013) (holding that, where district court's restitution order was not final when timely notice of appeal was filed, it "ripened into an effective notice of appeal on the date the district court made its final restitution determination") (citing *Kapelushnik*). Notably, two of the decisions from other circuits – the Second and Sixth Circuit's decisions in *Hyde* and *Stoian* – expressly relied in part on the Eleventh Circuit's since-overruled precedent in *Kapelushnik*.

In its decision below, the Eleventh Circuit reversed course, holding that a single notice of appeal does not suffice to confer jurisdiction over the restitution issue. JA 85, 618 F. App'x at 583. The Eleventh Circuit explained that its reversal was driven by this Court's decision in *Dolan*. JA 83-85, 618 F. App'x at 582-83. Yet, the *Dolan* decision does not undercut the application of the premature notice provision of Rule 4(b)(2).

States v. Walker, 915 F.2d 1463, 1465 (10th Cir. 1990) (holding premature notice of appeal filed before sentencing ripens when judgment is formally finalized, conferring jurisdiction on Court of Appeals).

To be sure, the Eleventh Circuit's jurisdictional holding in *Manrique* is the outlier, at odds with every other circuit to have spoken on the question, its own prior circuit precedent, and modern federal rules of practice and procedure.

B. Applying Fed. R. App. P. 4(b)(2) to notices of appeal filed before entry of an amended judgment specifying the sentence of restitution conforms to the Federal Rules of Appellate Procedure.

Under the modern Federal Rules of Appellate Procedure, an appeal is perfected by the filing of a notice of appeal that is timely under Rule 4. *See* Fed. R. App. P 3(a)(1). The antiquated practice of assignment of errors was abolished as "obsolete" by the middle of the last century. Fed. R. App. P. 3(a), advisory committee's note (1967 Adoption). Rules of practice since then "requir[e] nothing other than the filing of the notice of appeal in the district court for the perfection of the appeal." *Id.* As in any appeal of a criminal judgment, the precise issues to be raised are not revealed until briefing. Although the spectrum of potential issues is vast – *e.g.*, adequacy of the charging document or plea, jury selection, admission or exclusion of evidence, jury instructions, sufficiency of evidence, argument, sentencing, fine, forfeiture and restitution – the issues raised in a given appeal are not denominated in advance of briefing, and there is certainly no requirement that a party designate errors any earlier. The portions of the judgment appealed and the questions raised are

first identified and fleshed out by the briefs. As a result, a notice of appeal that matures under Rule 4(b)(2) provides the same notice that the rules of practice contemplate.

The notice of appeal simply places the court of appeals and parties on notice that the final judgment in a criminal case is being appealed, allowing the court clerk to docket that action for further proceedings. The amended restitution judgment completes the final judgment. *See Ryan*, 806 F.3d at 692. Any requirement for a second notice of appeal during the pendency of the direct appeal begs for form over substance.

The rules governing criminal appeals are different from civil appeals. The rules governing civil appeals specifically contemplate that an amended notice of appeal will be filed after an amended judgment. *See* Fed. R. App. P. 4(a)(4)(B)(ii). Rule 4(a)(4)(B)(ii), applicable only to civil appeals, requires a civil appellant to file a second notice of appeal to challenge "a judgment's alteration or amendment." *Id.* In recognition that such additional notices are required, Rule 4(a)(4)(B)(iii) exempts the additional notices from multiple filing fees in civil cases. These provisions have no counterpart in the subsections of Rule 4 relating to criminal appeals. The requirement for multiple notices is absent from the rules governing criminal appeals, as is the fee exemption for such notices. The absence of parallel provisions for criminal appeals confirms that a second notice of appeal is not required for an amended criminal judgment entered during the pendency of an appeal of the initial judgment. *See United States v.*

Malcolm, 114 F.3d 1190. Relying on three published circuit decisions and a respected treatise on federal appellate procedure, *Malcolm* explained that several circuits have reasoned that the differing provisions for civil and criminal appeals imply that an appellant in a criminal case is under no duty to amend his notice of appeal, so long as the government is not prejudiced by the filing of only one. *Id.*, at *7, citing *United States v. Thornton*, 1 F.3d at 157-58 (3rd Cir.); *United States v. Winn*, 948 F.2d at 155 (5th Cir.); *United States v. Walker*, 915 F.2d at 1465 (10th Cir.); *see also*, 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure Jurisdiction* § 3950.11, 253-54 (2d ed. 1996).

Other subsections of Rule 4(b) address the deadlines for certain aspects of criminal appeals, but do not refer to the appeal of an "amended judgment" – much less to the amendment of a "sentence" that fills in an amount of "restitution." Fed. R. App. P. 4(b)(3) provides that if a motion for judgment of acquittal, new trial, or arrest of judgment is filed, the time for appeal runs from the entry of an order disposing of the motion or entry of the judgment, whichever period ends later. It does not mention or include amended judgments, or sentences, but rather addresses freestanding orders that are also appealable apart from the final judgment. Also, as to the three subject motions only, it clarifies the time limits for filing an appeal if one of the three subject motions is decided before the initial judgment is entered. *See* Fed. R. App. P. 4(b)(3) advisory committee's note (1993 amendment). Rule 4(b)(4) applies the

maturing notice rule to the orders disposing of the three subject motions, but is not implicated as to appeals of a final judgment. None of the remaining portions of Rule 4(b) bear on appeals of amended judgments specifying restitution.

On the other hand, applying Rule 4(b)(2)'s maturing notice provision to deferred restitution judgments is entirely consistent with the prevalence of electronic filing in federal courts, *see* Fed. R. App. P. 25(a)(2)(D), which has simplified the filing of amended judgments on the dockets of both the district courts and courts of appeals. Every district court and court of appeals utilizes electronic filing. *See* United States Courts, Judiciary News, "All Federal Courts Now Accepting Electronic Filing" (May 17, 2012) (available at http://www.uscourts.gov/news/2012/05/17/all-federal-courts-now-accepting-electronic-filing) (last viewed June 24, 2016). The universal implementation of Case Management/Electronic Case Files (CM/ECF) "provides courts enhanced and updated docket management. It allows courts to maintain case documents in electronic form." *Id.* Court clerks file amended judgments electronically, without the antiquated process of preparing volumes of a paper record or supplemental record. *See, e.g.*, JA 7 (DE 76) ("The entire record on appeal is available electronically."). Here, for example, the amended judgment was filed on the Court of Appeals' docket only five days after it was entered in the district court,

without any further designation or prompting by counsel. JA 9-10.[4]

The alternative interpretation now employed by the Eleventh Circuit is anything but pragmatic, and is replete with judicial inefficiencies inconsistent with the rules of practice. It requires a second notice of appeal and a costly duplicate filing fee.[5] For indigent defendants, like Mr. Manrique, the filing fee is waived, but the duplicated administrative cost associated with a second appeal is borne by the public fisc. The district court clerk must transmit the second notice to the clerk of the court of appeals, who dockets an additional case in the court of appeals, *see* Fed. R. App. P. 12(a), disconnected from the original. A process of consolidation may then occur, usually on motion of a party, *see* Fed. R. App. P. 3(b)(1), but until that occurs the two appeals remain separate, with independent schedules for filing transcripts, preparing the record, and for briefing. Any preliminary matters are addressed by separately assigned panels of the court of appeals, and if the cases are not consolidated, the court of appeals doubles the use of judicial resources, fragmenting the

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[4] The appellant has a continuing duty to ensure that the record includes all filings and transcripts necessary for the issues presented on appeal. *See* Fed. R. App. P. 10(b) & 11(a).

[5] As noted, the exemption from paying a second filing fee for notices filed following amended judgments in civil appeals, set forth in Fed. R. App. P. 4(a)(4)(B)(iii), does not apply to criminal appeals and has no corollary in the criminal subsections of Rule 4. It seems likely, however, that a corollary rule would exist if the drafters intended multiple notices of appeal in a single criminal appeal.

decision-making of the judgment imposing sentence, and the restitution aspects of what has become a single final judgment. Not only is this interpretation impractical and cumbersome, but it also creates for criminal appeals the kind of "notice trap" that once existed in civil appeals, but was rightly abolished by the appellate rules amendments promulgated in 1993.

The notice trap in civil cases was caused by a former rule of appellate procedure and the Court's interpretation of that rule. Prior to the 1993 amendments, Rule 4(b)(1) (civil appeals) provided that "[a] notice of appeal filed before the disposition of any of the [designated post-trial] motions shall have no effect." Fed. R. App. P. 4(a)(4) (1979). This Court had interpreted that provision in a civil case as making such a notice of appeal a "nullity, . . . as if no notice of appeal were filed at all." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). The 1993 amendments to Rule 4 replaced the "nullity" rule in civil appeals with a rule that recognizes ripening of a premature notice of appeal. *See* Fed. R. App. P. 4(b)(2) advisory committee's note (1993 amendment). The Advisory Committee explained that the provision was written to eliminate the "trap" that previously occurred in a civil appeal if an unsuspecting litigant did not file a second notice of appeal in the event an amended judgment was entered while the appeal was pending under the original notice of appeal. *Id.* The rules were rewritten to be explicit about when an amended notice of appeal is required. As a result of the 1993 amendments, Fed. R. App. P.

4(a)(4)(B)(ii) now specifies precisely when a second notice of appeal is required in the case of an amended judgment in a civil case.

Although this eliminated the trap in civil cases, the trap never existed in criminal appeals. Yet, if Rule 4(b)(2)'s premature notice provision is not interpreted to cover amended restitution judgments, it creates a trap where there never has been one before. The rules governing criminal appeals are silent on the need to file a second or amended notice of appeal following an amended judgment that fills in the blanks of restitution previously awarded. Depending on the circuit in which a restitution appeal arises, and the timing of an amended judgment, any given appeal might require only a single notice, or it may require two, even though the amended judgment is entered during the direct appeal initiated by the original notice of appeal. The potential for confusion for the unsuspecting litigant, despite diligently following the written rules, recreates a trap of the kind the Court abolished when it adopted the Advisory Committee's redrafting over two decades ago.

C. Assuming, *arguendo*, that an irregularity occurred, dismissal was improper because the requirements for perfecting an appeal in federal criminal cases are not jurisdictional, but rather are governed by the substantial prejudice test of Fed. R. Crim. P. 52(a).

A federal criminal appeal is initiated by the filing of a timely notice of appeal under the limits set forth

in the Federal Rules of Appellate Procedure. Fed. R. App. P. 3(a)(1) and 4(a)(1) & (2). The time limits set by the rules for criminal cases are not jurisdictional. *Bowles v. Russell*, 551 U.S. 205, 212 (2007).

In *Bowles*, this Court distinguished between the time for filing an appeal in a civil case, which is based on a congressional statute, and appeals from criminal cases, which are based only on court rule. Statutory time limits in civil cases, the Court held, are jurisdictional, but the rule-based limits in criminal appeals are not: "We have treated the rule based time-limit for criminal cases differently, stating that it may be waived because '[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. . . .' *Schacht* [*v. United States*, 398 U.S. 58 (1970)] at 64." *Bowles*, 551 U.S. at 212; *see United States v. Lopez*, 562 F.3d 1309, 1312-13 (11th Cir. 2009) ("Because the deadline in Rule 4(b) for a defendant to file a notice of appeal in a criminal case is not grounded in a federal statute, we hold that it is not jurisdictional.") (citing *Bowles*).

Irregularities in perfecting criminal appeals are evaluated under Fed. R. Crim. P. 52(a), which requires that they be disregarded unless substantial rights are affected. *Lemke v. United States*, 346 U.S. 325 (1953) (per curiam). In *Lemke*, the Court considered the jurisdictional significance of Fed. R. Crim. P 37, the predecessor to Fed. R. App. P. 4(b)(2). Lemke filed his notice of appeal after sentencing, but three days before the judgment in a criminal case was entered. No notice of

appeal was filed after that time. In a divided decision, the Ninth Circuit Court of Appeals dismissed the appeal due to the premature notice of appeal. One judge dissented, concluding that "the notice of appeal, though premature, was not a nullity. I think the defect and irregularity here is of the sort we are required to disregard by Criminal Rule 52(a)." *Lemke v. United States*, 203 F.2d 406, 407 (9th Cir. 1953) (Pope, J., dissenting), *cert. granted, reversed and remanded*, 346 U.S. 325. Then, as now, Fed. R. Crim. P. 52(a) directed that "[a]ny error, defect, irregularity or variance that does not affect substantial rights must be disregarded."[6] This Court granted certiorari, reversed and remanded to the Ninth Circuit, noting that the notice of appeal was still on file when the judgment was entered, "and gave full notice after that date, as well as before, of the sentence and judgment which petitioner challenged." 346 U.S. 326. The Court held – consistent with the black letter of Rule 52(a) and Judge Pope's dissent – that the "irregularity is governed by Rule 52(a) which reads 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" 346 U.S. 326.

The Eleventh Circuit's conclusion that it lacked jurisdiction to entertain Mr. Manrique's challenge to his

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[6] Adopted in 1944, Rule 52(a) was a "restatement of existing law, 28 U.S.C. former § 391 (second sentence)" which required an appeal to be decided "after an examination of the entire record before the court, without regard for technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Fed. R. Crim. P. 52(a) advisory committee's note (1944 Adoption).

restitution amount, due to alleged noncompliance with a rule of appellate procedure, misapplied principles of jurisdiction in place of the substantial-rights test. To the extent the Eleventh Circuit's decision rests on jurisdiction, its holding is indefensible.

Lemke holds a court of appeals has jurisdiction over a premature notice of appeal. An alleged irregularity does not cause a jurisdictional deficit, but rather it raises a question whether substantial rights have been affected under Fed. R. Crim. P. 52(a). *Id.*; *see Bowles*, 551 U.S. at 212 (time-based procedural rules in criminal cases "can be relaxed by the Court in the exercise of its discretion") (quoting *Schacht*). As in the typical deferred restitution appeal, the notice of appeal in this case captured restitution both in the first instance, and as amended with a specific dollar amount. The events below demonstrate that the absence of a second notice of appeal in the same appellate case did not affect the government's substantial rights one whit.

In his oral pronouncement of sentence, the district judge specifically announced that restitution was mandatory. Those words included restitution in the sentence from the very first. The written judgment then incorporated the oral pronouncement including restitution, but noted that the amount of restitution would be decided at a future date, followed by an amended judgment to reflect this. Both the oral pronouncement and the original written judgment ordered restitution (albeit sans specifics) and the written judgment spoke to the fact that a more specific amended judgment

would be entered. Thus, when the defendant filed a timely notice of appeal as to the first judgment, it followed both the oral pronouncement that restitution is mandatory and the written judgment that the precise amount would be designated in an amended judgment. The amended judgment specifically connects to the restitution left open in the initial judgment, reciting that it amends the initial judgment by "Modification of the Restitution Order." JA 66. As in *Dolan*, the sentencing judge "essentially fill[ed] in an amount-related blank in a judgment that made clear that restitution was 'applicable.'" 560 U.S. at 620. Thus, the original notice of appeal captured that portion of the judgment involving restitution and the language in that original judgment relating to a future amended judgment. *See United States v. Cheal*, 389 F.3d at 46-47, 53 (holding that where sentencing judge announced, "[y]ou shall pay restitution," but written judgment deferred restitution award, single notice of appeal from original judgment gave Court of Appeals jurisdiction to hear appeal of amended restitution judgment); *United States v. Ryan* (same); *United States v. Hyde* (same); *United States v. Stoian* (same).

The notice of appeal enveloped the original judgment and it ripened automatically under Rule 4(b)(2) to include the amended judgment mentioned in the original judgment, once the amended judgment was entered. All parties and the clerk of the Court of Appeals understood this. All transcripts, orders and briefs were filed in the single appellate case, and both parties

fully briefed the restitution issue, without misunderstanding. The government alleged no prejudice and suffered none.

Experience following the *Dolan* decision has taught that the possibility of prejudice resulting from a single notice of appeal is remote, so remote that it has yet to occur in a reported decision. Indeed, post-*Dolan* restitution appeals have been uniformly decided by a single panel of appellate judges in a single opinion, without prejudice to any party.[7] This should come as no surprise since that likelihood was predicted by the Solicitor General's brief in *Dolan* based upon a statistical analysis of the median duration of criminal appeals in federal court. *See Dolan v. United States*, 2010 WL 1220084 (U.S.) (Appellate Brief) Supreme Court of

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[7] A survey of post-*Dolan* restitution appeals reveals that each was decided in a single opinion by a single panel, without any mention of prejudice, regardless of the underlying charges, or the timing of the restitution judgment or notice of appeal: *United States v. Ryan*, 806 F.3d 691 (2d Cir. 2015); *United States v. Messina*, 806 F.3d 55 (2d Cir. 2015); *United States v. Bour*, 804 F.3d 880 (2d Cir. 2015); *United States v. Scalzo*, 764 F.3d 739 (7th Cir. 2014); *United States v. Rodriguez*, 751 F.3d 1244 (11th Cir. 2014); *United States v. Ocasio*, 750 F.3d 399 (4th Cir. 2014), *aff'd*, ___ U.S. ___, 136 S. Ct. ___ (2016); *United States v. Battles*, 745 F.3d 436 (10th Cir. 2014); *United States v. Walsh*, 723 F.3d 802 (7th Cir. 2013); *United States v. Chaika*, 695 F.3d 741 (8th Cir. 2012); *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *United States v. Viola*, 555 F. App'x 57 (2d Cir. 2014); *United States v. Healy*, 553 F. App'x 560 (6th Cir. 2014); *United States v. Beckford*, 545 F. App'x 12 (2d Cir. 2013); *United States v. Hagerman*, 506 F. App'x 14 (2d Cir. 2012); *United States v. Abdelbary*, 496 F. App'x 273 (4th Cir. 2012); *United States v. Edkins*, 421 F. App'x 511 (6th Cir. 2010); *United States v. Riolo*, 398 F. App'x 568 (11th Cir. 2010).

the United States (Mar. 26, 2010). Responding to Mr. Dolan's contention that deferred restitution judgments under 18 U.S.C. § 3664(d)(5) would likely create piecemeal and multiple appeals, the government rejected that concern based upon real-world experience about the length of criminal appeals:

> [I]n the majority of cases in which the court does invoke that provision, it can be expected to comply with the law and issue an amended judgment setting forth a "final determination of the victim's losses" within 90 days of sentencing. Federal appellate courts currently take more than a year, on average, to resolve a criminal appeal. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2008 Annual Report of the Director 107 (2009).

Dolan Br. 25. The most recent Annual Report continues to support the government's prediction. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: 2015 Annual Report of the Director 107 (2015) (average time to resolve criminal appeal is 10.6 months). And, post-*Dolan* experience has proved this premise in the real world.

The reason the courts of appeals have discerned no prejudice from a single maturing notice of appeal is that the rules of practice and procedure easily accommodate any circumstance in which the government might otherwise suffer substantial prejudice. Indeed, it is difficult to imagine circumstances in which the government might suffer substantial prejudice from a

premature notice of appeal of a deferred amended restitution judgment. Only two possibilities come to mind, but in either event the potential for prejudice is avoided by existing appellate rules and practice.

First, the government might only decide to cross-appeal when the amended judgment is entered, if restitution is not awarded as requested. Arguably, its time to cross-appeal will have expired by that time because its due date is based on the filing of the original notice of appeal. Should this occur, the government does not lose its right to cross-appeal since either party may appeal the amended restitution judgment separately. *See Gonzalez v. United States*, 792 F.3d 232, 237 (2d Cir. 2015) (holding that there are "two opportunities to appeal: from an initial sentence, even if some aspects of the sentence are not final; and from the final order disposing of the case in the district court"), followed in *United States v. Ryan*, 806 F.3d 691, 692 n.1. In such event, the government's time for filing a cross-appeal renews upon entry of the amended judgment, so it does not suffer any prejudice.

Secondly, the amended restitution judgment might be filed after all briefing has transpired in the court of appeals, preventing the government from making a fulsome argument on the restitution question. The rules of practice allow, and practical experience demonstrates, that briefing of the issues can be held in abeyance until the amended judgment is filed. *See, e.g.*, *United States v. Ryan*, 806 F.3d 691 (accepting single notice of appeal timely filed following 2011 judgment to perfect appeal of 2015 amended judgment detailing

restitution; holding appeal in abeyance awaiting the amended judgment); *United States v. Bour*, 804 F.3d 880 (resolving in single appeal both the original judgment and amended judgment including restitution entered 235 days later); *United States v. Rodriguez*, 751 F.3d 1244, 1260 (staying appeal of April 2012 judgment for over two years until amended judgment including restitution was filed after a June 2014 hearing). If, on the other hand, the parties or court of appeals seek an expeditious resolution of the appeal of the judgment and sentence, such that briefing and argument occur before the amended judgment is entered, a separate appeal is optionally available to either party by filing a notice of appeal from the deferred amended restitution judgment. *See Gonzalez*, 792 F.3d at 237 and *Ryan*, 806 F.3d at 692 n.1.

The absence of a second notice of appeal caused no prejudice in the present case and it seems virtually impossible to impact any deferred restitution appeal. A single maturing notice of appeal fits comfortably within the federal rules of procedure and practice.

* * *

Rule 4(b)(2) allows a single notice of appeal to perfect an appeal of both the initial judgment imposing sentence (including restitution, generally), as well as an amended judgment specifying the amount of restitution. This reading of the rule comports with the Court's precedents, the rules governing criminal appeals, the *Restatement (Second) of Judgments*, and is in accord with the established practices of the courts

of appeals. The Eleventh Circuit's categorical refusal to entertain an appeal of the restitution amount in Mr. Manrique's sentence resulted from a fundamental misunderstanding of its jurisdiction, the rules governing criminal appeals, and the proper analytical framework applicable if a court suspects that there has been an irregularity in perfecting an appeal.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should reverse the categorical conclusion of the Eleventh Circuit that it lacked jurisdiction over the restitution issue on appeal, and remand the case for a ruling on the merits of the restitution issues.

Respectfully submitted,

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